IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1141 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMESH FULCHAND PARMAR

Versus

STATE OF GUJARAT

Appearance:
MR JM PANCHAL for appellants Nos. 1 and 4
Mr. S.V. Raju for appellants Nos. 2 and 3
Mr. N.D. Gohil, APP, for the State

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE A.L.DAVE

Date of decision: 20/09/2000

ORAL JUDGMENT: (Per; Kadri, J.)

1. Appellants, who are original accused in Sessions Case No.16 of 1993, have challenged legality and validity of judgment and order dated September 16,1993, of learned Additional Sessions Judge, Ahmedabad (Rural), in Sessions Case No.16 of 1993, by which judgment and order, appellant No.1 was convicted for offence punishable under Section 302 of Indian Penal Code and sentenced to undergo imprisonment for life and fine of Rs.5000/- in default simple imprisonment for one year; whereas appellants Nos. 2, 3 and 4 were convicted for offence punishable under Section 302 read with Section 34 of Indian Penal Code, and each of appellant was sentenced to undergo imprisonment for life and fine of Rs.5000/- in default simple imprisonment for one year.

2. The prosecution case, as unfolded at the trial, can be summarised as under:- P.W. 2, Induben, is wife of P.W 7,Jayantilal Soni, who was at the relevant time serving as Assistant in the Panchayat Department, Gandhinagar. Sister of Induben, namely, Padmaben, was married with Ramanbhai, brother of P.W.7 Jayantilal Soni, who was at the relevant time serving as Stenographer, in Vidhan Sabha, at Gandhinagar. Induben had two sons, namely, Jitendra and Hitesh, whereas, her sister, Padmaben had two sons, namely, Bharat and Prakash. Jitendra, son of Induben, was studying in a secondary school situated at Sector No.7. Appellant No.1 had lurking suspicion that Jitendra had an affair with his sister, Sapna. As appellant No.1 did not like the relationship between Jitendra and Sapna, on October 1, 1992, at night hours, he had gone to the house of Jitendra and had told him to come out of the house. When Jitendra came out of his house, he was beaten up by appellant No.1 and, during the scuffle, his bush-shirt was also torn off. Neither Jitendra nor his parents had complained about the incident before the police. However, on October 3, 1992 in the afternoon, P.W. 7, Jaynatilal Manilal Soni and his brother Ramanbhai Manilal Soni, had gone to the office of father of appellant No.1 to request him to persuade appellant No.1 not to harass Jitendra and not to come to their house. It is revealed that, in response to request of P.W. 7, Jayantilal Manilal Soni, and his brother Ramanbhai, father of appellant No.1, Fulchand, had told them that he would try to persuade appellant No.1 not to repeat the incident which had taken place prior to two days. As per the prosecution case, on October 3, 1992, at about 18 hours, appellant No.1 who was armed with screw-driver, appellant No.2, who was carrying a stone, appellant No.3 who was armed with stick in the company of appellant No.4, had gone on a scooter with intention to cause murder of

Jitendra or any member of his family. When the appellants reached near house of P.W. 7, Jayantilal, the scooter, on which they were travelling, was parked at distance of the house and appellant No.4 was standing near the scooter and engine of the scooter was kept on. Appellants Nos. 1, 2 and 3 went to the house of P.W. 7, Jayantilal. Appellant No.1 told Jayantilal and Induben that why they had gone to the office of his father and he further told them to call Jitendra out of the house so that he can beat him. Induben instructed Prakash not to permit Jitendra to come out of the house. Induben and Bharat (hereinafter referred to as 'deceased') came out of the house and her husband, Jayantilal, had also followed them. There was heated exchange of words between appellant No.1 and Induben as a result of which, appellant No.1 took a screw-driver and tried to launch an attack on Induben. Induben caught hold of hand of appellant No.1 and snatched away the screw driver and during that snatching process, appellant No.1 had fallen down. Appellant No.2 had snatched away the screw driver from the hands of Induben and during that time appellant No.1, who had fallen down, had got up and snatched away the screw driver from appellant No.2, While snatching away screw driver from appellant No.2, appellant No.1 uttered words that, "if not Jitendra, we should finish his brother Bharat". Uttering these words, appellants Nos.1, 2 and 3 launched attack on Bharat. As per the prosecution case, appellant No.1 had given two blows with screw driver on the back of Bharat and appellant No.2 had caught hold of Bharat from the front side and had given a blow with stone on the back of Bharat. It is alleged that appellant No.3, who was carrying stick, had also inflicted stick blow on hand of Bharat, as a result of which, Bharat had fallen down. In the meantime, Jitendra and Prakash had come out from the house of P.W. 7. It is further alleged that other inhabitants residing in the neighbouring houses had also come out and, therefore, appellants nos. 1, 2 and 3 had run away from the place of incident towards scooter, which was parked at some distance from the house of P.W.7. The prosecution case further disclosed that, thereafter, appellant No.4 had driven scooter and had carried all other appellants and had fled away from the scene of offence. Bharat, who had fallen down in injured condition, was taken to Civil Hospital, Gandhinagar. Induben accompanied Bharat to the Hospital where the Doctor on duty, after examining Bharat, declared him dead. P.W. 8, Police Head Constable, Gulamrasul Gulabkhan, was on duty at the Civil Hospital, Gandhinagar, and he had sent vardhi Exh.41, about death of Bharat to Gandhinagar Police Station and on the basis of that vardhi, P.I. V.S. Patel, had

started investigation and had arrived at Gandhinagar Civil Hospital and inquest was held on dead body of Bharat and the same was sent for post-mortem. P.W. 1. Dr. Amrutbhai Lallubhai Patel performed post-mortem of the dead body of Bharat. Blood-stained clothes put on by deceased Bharat were seized under panchanama. P.W. 2 Induben gave complaint to P.I. Patel around 8 p.m. which was recorded in the Civil Hospital, Gandhinagar. The said complaint was, thereafter, sent to Gandhinagar Police Station wherein offence was registered at C.R. no.I-620/1992 by P.S.O. Kishoresinh at at Gandhinagar Police Station. Investigation of the above crime register was handed over to P.I. Patel. On the next day, P.I. Patel with two panchas drew panchanama of scene of offence, which was situated in Sector No.7, near Block No.721/2. From the scene of offence, a key chain, containing photographs of appellant No.1 and four keys, was seized under panchanama. Scene of offence was shown by P.W.2, Induben, and she had identified the key chain belonging to appellant No.1. Thereafter, P.I. Patel recorded statements of witnesses, Rasilaben, Jayantilal, Madhuben, Jagdishbhai Harjivan Survekar, Nainaben Chandubhai Patel, Vinodchandra Champaklal Shah, etc. Police Head Constable, Gulamrasul Gulabkhan, had produced clothes put on by deceased Bharat on the day of incident at the police station, which were seized under a panchanama. Appellant Nos. 1, 2 and 3 had surrendered themselves at the police station and their arrest panchanama was prepared. As it was found that appellant Nos. 2 and 3 were injured, they were sent for medical examination to Civil Hospital, Gandhinagar. Appellant No.4 had surrendered to the police custody and, therefore, he was also arrested under a panchanama. While appellant No.1 was in custody, he had shown his willingness to produce muddamal screw driver which was hidden by him. P.I. Patel called two panchas and preliminary panchanama was drawn at the police station. Thereafter, in the company of two panchas, appellant No.1 and other police personnel, P.I. Patel had gone to the place in a police vehicle as guided by appellant No.1. Appellant No.1 had requested to stop the vehicle near block No.33/1 situated at Sector No.23, wherein, one scooter of blue colour bearing RTO registration No.GJ-I-A 8061 was parked. Appellant No.1 took out screw driver from the dicky of the scooter. Said screw driver was having blood stains. Therefore, said screw driver was seized under panchanama in presence of two panchas. Statement of owner of scooter, namely, Dahyabhai Danabhai Parmar, was recorded. Appellant No.3, while in custody, had also shown his willingness to produce muddamal article stick which was used in commission of crime and,

therefore, P.I. Patel called two independent panchas and preliminary panchanama was drawn at the police station and, thereafter, two panchas and police personnel in company of appellant No.3 in a police vehicle had gone to the place as shown by appellant No.3, which was block no.469, situated at Sector 6. Appellant No.3 took panchas and PI Patel to block No.469/6, where he had kept muddamal stick which was hidden under a cot. A panchanama was prepared by which said stick came to be seized on October 4, 1992. P.I. Patel had also recorded statements of Jayantilal Manilal Soni and Rameshbhai Manilal Soni, Hitesh Jayantilal Soni. P.I. Patel had sent a yadi to Revenue Circle Inspector for preparing a sketch of place of incident. After receipt of yadi, Circle Inspector, Jayshreeben Nareshkumar Shah, P.W.6, had drawn map of place of incident on October 5, 1992. Incriminating articles which were seized during investigation were sent to the Forensic Science Laboratory for analysis. P.I.Patel received post-mortem notes on October 14, 1992 and, had, thereafter, recorded statements of Haresh Bhagwanbhai Gandhani on November 11, 1992. After completing investigation, chargesheet against the appellants came to be filed on December 1,1992 in the court of learned Judicial Magistrate, First Class, Gandhinagar, which came to be numbered as Criminal Case No.5581 of 1992, for offences punishable under Sections 302, 323 read with Section 34 of the Indian Penal Code and under Section 135 of the Bombay Police Act. As the offence under Section 302 of Indian Penal Code was exclusively triable by the Court of Sessions, learned Magistrate committed case for trial to the Sessions Court at Ahmedabad (Rural) which came to be numbered as Sessions Case No.16 of 1993.

3. Charge Exh.5 was framed against the appellants for offence punishable under Section 302 read with section 34 of Indian Penal Code and under Section 135 of the Bombay Police Act. Charge was read over and explained to the appellants. The appellants pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution led oral as well documentary evidence against the appellants to substantiate the charge.

4. The prosecution in order to bring home guilt of appellants, examined (I) P.W.1, Dr. Amrutbhai L. Patel, Exh.17, (II) P.W.2. Induben Jayantilal Soni, Exh.19, (III) P.W. 3, Chhatrasinh Motisinh Gohil, Exh.21, (IV) P.W. 4, Arvind Chhanalal Patel, Exh.26, (V) P.W. 5, Dr. Natverlal G. Thakker, Exh.30, (VI) P.W. 6, Jayashreeben

Nareshkumar Shah, Exh.34, (VII) P.W.7, Jayantilal Manilal Soni, Exh.38, (VIII) P.W. 8, Gulamrasul Gulabkhan, Exh.39, (IX) P.W.9, Kishorsinh Vajubha, PSO, Gandhinagar Police Station, Exh.40, (X) P.W.10, Nathuji Pathuji, PSO, Gandhinagar Police Station, Exh.43, (XI) P.W.11, Prakash Ramanbhai Soni, Exh.45, (XII) P.W.12, Bachubhai Dhulabhai Rana, Exh.46, (XIII) P.W. 13, Jitendrakumar Jayantilal Soni, Exh.48, (XIV) P.W. 14, Haresh Bhagwandas Gadani, Exh.50, and (XV) P.W.15, I.O. P.I. Vittal S. Patel, Exh.51. The prosecution also produced documentary evidence such as inquest panchanama Exh.13, panchanama of seizure of clothes of deceased Exh.14, post-mortem notes Exh.18, complaint Exh.20, panchanama of seizure of screw driver at Exh.21, panchanama of discovery of stick Exh.32, medical certificates of appellants No.2 and 3 Exhs. 32 and 33 respectively, map of scene of offence Exh.36, vardhi sent from the Civil Hospital, Gandhinagar, at Exh.41, first information report Exh.44, panchanama of arrest of appellant Nos.1, 2 and 3 at Exh.47, report of FSL at Exh.56, vardhi recorded at Gandhinagar Police Station at Exh.48, and another vardhi recorded at Gandhinagar Police Station at Exh.59.

5. After recording of evidence of prosecution witnesses was over, further statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure, 1973. The case of appellant No.1 in his further statement was of total denial. In further statement, appellant No.2 denied the prosecution case. However, he explained injuries found on his person by stating that he had sustained injuries while in police custody due to beating by the police personnel. Appellant No.3, during recording of his further statement, also filed his reply, wherein, he had stated that, while he was in custody on October 4, 1992 at Gandhinagar Police Station, police personnel had given him fist blow as a result of which he had sustained injury on the left upper lip. Appellant No.4, in his further statement, stated that he was falsely involved in the case.

6. Learned Additional Sessions Judge, after hearing learned Public Prosecutor and learned counsel for the appellants, concluded that Bharat Ramanlal Soni had died a homicidal death. It was also concluded that all the appellants had a common intention to cause death of Bharat. It was further concluded that the appellant had committed breach of notification issued by the Additional District Magistrate, Gandhinagar, under Section 135 of the Bombay Police Act. Learned Additional Sessions Judge was of the opinion that the evidence of eye-witnesses was

trust-worthy and reliable. It was deduced that, even though there was minor improvements and omissions in the evidence of eye-witnesses, but they were negligible which did not destroy substratum of prosecution's case. Learned Additional Sessions Judge concluded that first information report in the present case was filed without any delay and delay in sending copy of first information report to the nearest Magistrate was of no consequence. Learned Additional Sessions Judge further held that discovery of screw driver at the instance of appellant No.1 and discovery of stick at the instance of appellant No.3 were corroborative pieces of evidence to connect the appellants with commission of crime. On the abovereferred to conclusion, learned Additional Sessions Judge held that the prosecution proved beyond reasonable doubt that all the appellants had a common intention to cause death of deceased Bharat on October 3, 1992 and in furtherance of common intention, had actually caused death of Bharat near the house of P.W.7, Jayantilal. Learned Additional Sessions Judge convicted appellant No.1 for the offence punishable under Section 302 of Indian Penal Code whereas appellants Nos. 2, 3 and 4 were convicted under Section 302 read with section 34 of the Indian Penal Code and all the appellants were convicted and sentenced to undergo R.I. for life and fine of Rs.5000/in default S.I. for one year, which has given rise to filing of this appeal by all the appellants.

7. Mr. J.M. Panchal, learned counsel for appellant Nos. 1 and 4, Mr. S.V. Raju, learned counsel for appellant Nos. 2 and 3, and learned Additional Public Prosecutor, Mr. N.D. Gohil, have taken us through entire record and proceedings of Sessions Case No.16 of 1993.

8. Learned counsel, Mr. J.M. Panchal, for the appellants, has submitted that charge Exh.5 was not specific and therefore being defective has caused serious prejudice to the appellants more particularly appellant No.4. Learned counsel submitted that, in charge Exh.5, it was mentioned that appellants Nos. 2, 3 and 4, with stone and stick, had caused injuries to deceased Bharat. Learned counsel further submitted that from the prosecution evidence and the complaint lodged by Induben, it had come on record that appellant No.4 had not caused injuries to deceased Bharat with any weapon or with hands. In spite of above fact, learned Additional Sessions Judge had framed charge against appellant No.4 indicating that he had caused injuries to deceased Bharat with stone and stick. On the other hand, learned

Additional Public Prosecutor, Mr. N.D.Gohil, has submitted that no prejudice was caused to appellant No.4 in particular, because, in further statement recorded under Section 313 of Code of Criminal Procedure, he was specifically asked question that he was standing at a distance from the place of incident with scooter the engine of which was kept in motion so as to facilitate other appellants to run away after committing the crime. In support of the submission, learned Additional Public Prosecutor has placed reliance on the decision of the Supreme Court in the case of State of A.P. vs. Thakkidiram Reddy and others, reported in (1998) 6 Supreme Court Cases 554. The Supreme Court, in paragraph 11, has ruled that, "when accused persons were specifically told of their having committed offences under sections 148 and 302/149 Indian Penal Code, no prejudice was caused to the accused persons". The Supreme Court has, further, ruled that, "by not framing specific charge, the Sessions Court had merely committed an irregularity which has not caused any serious prejudice to the respondents before the Supreme Court". In the present case also, in further statement, a specific question was put to appellant No.4 whether he had gone at the place of the complainant on scooter which was parked at the distance and again a specific question was put to appellant No.4 that, after the incident, when appellants Nos. 1, 2 and 3 had run away from the place of incident, they had come to the scooter, engine of which was kept on and in the company of other appellants, appellant No.4 had fled away on the scooter. Thus, in further statement, case against appellant no.4, as unfolded at the trial, was specifically put to him and, therefore, we are of the view that no prejudice is caused to appellant No.4 as he was specifically questioned with regard to role played by him in commission of crime.

9. Learned counsel, Mr. J.M. Panchal, for the appellants has vehemently submitted that, in this case, vardhi Exh.41 would be first information report because as soon as on receipt of vardhi by the Gandhinagar Police Station, investigation had already begun. Learned counsel further submitted that complaint Exh. 20 of Induben which was recorded by P.I, Patel, at Gandhinagar Police Station, would be a mere statement under Section 161 of the code which will be hit by Section 162 of the Code. Learned Additional Public Prosecutor, on the other hand, submitted that Exh.41, which was vardhi, sent by Police Head Constable, Gulamrasul Gulabkhan, was vague and indefinite telephone message making the Investigating Agency only to rush to the scene of offence, will not constitute first information report. Learned Additional

Public Prosecutor, in support of his submission, has placed reliance on the decision of the Supreme Court in the case of Dhannjoy Chatterjee Alias Dhana vs. State of W.B. reported in 1994 Supreme Court Cases (Cri.) page 358. The Supreme Court in the above decision, had ruled that vague and indefinite information given on telephone which made Investigating Agency only to rush to the scene of occurrence, could not be treated as first information report under Section 154 of the Code of Criminal Procedure. It is true that P.I. Patel, on receiving vardhi Exh.41, had rushed to Civil Hospital, Gandhinagar, and, thereafter, had recorded first information report lodged by P.W. 2, Induben, Vardhi, which was sent by Police Head Constable, Gulamrasul Gulabkhan, was a cryptic telephone message sent to Gandhinagar Police Station, which only conveyed message that, "in maramari' (beating), which had taken place in Sector No.7, near Block No.721/2, one Bharatbhai Soni had sustained injuries which had resulted into his death and dead body was brought to the Civil Hospital around 19.30 hrs. on October 3, 1992. We are of the opinion that, in view of the principles laid down by the Supreme Court in the case of Dhannjoy Chatterjee Alias Dhana (supra), vardhi Exh.41, which was cryptic telephone message sent by Police Head Constable, Gulamrasul Gulabkhan, cannot be treated as first information report and the learned Additional Sessions Judge was justified in treating complaint Exh. 20 as first information report which was lodged by P.W. 2, Induben at 20.15 hrs before P.I. Patel at the Civil Hospital, Gandhinagar.

10. Learned counsel, Mr. J.M. Panchal, for appellants, has submitted that the first information report, which was recorded on October 3,1992 at about 8.30 p.m. at Gandhinagar Police Station, was sent to the nearest Magistrate, i.e. Judicial Magistrate (First Class), Gandhinagar, on October 7,1992, which raises a serious doubt that the first information report was anti-timed and was lodged after due deliberations to falsely involve innocent persons. Learned counsel, in support of his submission, has relied upon decision of the Supreme Court in the case of L/NK. Meharaj Singh vs. State of U.P. reported in II (1994) CCR 516 (SC). Submission of learned counsel that the first information report was anti-timed and it was recorded after due deliberation and consultation and, therefore, it had lost its value and authenticity, in our opinion, does not deserve any merit and deserves to be rejected. It should be appreciated that offence under Section 302 was supervised by Sub-Divisional Police Officer. The Sub-Divisional Police Officer had verified complaint

Exh.20 lodged by P.W.2, Induben, before P.I, Patel, at 20.15 hrs on October 3,1992 at Gandhinagar Civil Hospital. The complaint was duly verified by Sub-Divisional Police Officer on the very same day, i.e. on October 3, 1992. Merely sending first information report to the nearest Magistrate in view of verification done by the Sub-Divisional Police Officer will not make the first information report ante-timed. The incident had taken place around 6 to 6.15 p.m. and dead body of Bharat was brought to Gandhinagar Civil Hospital at 7.30 p.m. on October 3, 1992. The complaint which was lodged by Induben was at 8.15 p.m. at the Civil Hospital, Gandhinagar, which cannot be said to be a delayed one. Learned counsel for appellant No.1 has strenuously urged that, according to P.I, Patel, complaint was registered in the FIR Register by Police Head Constable, Kishoresinh at 20.30 hrs. but the oral testimony of P.W.9, Kishoresinh revealed that his duty hours were over at 20.00 hrs. on October 3, 1992. Relying on the above inconsistency in the evidence of the police personnel, learned counsel Mr. Panchal submitted that the first information report was registered in the FIR Register on the next day and not on October 3, 1992 at 20.30 hrs. In our view, submission of learned counsel Mr. J.M. Panchal deserves to be rejected. Merely because the Investigating Officer had committed a mistake in stating that the first information report was registered in the register kept at the police station by Kishoresinh, it cannot be said that the first information report was ante-timed and was entered in the register when Kishoresinh had resumed his duties on October 4, 1992. Verification done by Sub-Divisional Police Officer makes it clear that the first information report was lodged by P.W.2, Induben, promptly at the Hospital at 8.15 p.m. and it was duly registered in the police station at 8.30 p.m. on the same day. We are, therefore, of the opinion that the first information report was not ante-timed nor it is lodged after due deliberation and consultation so as to involve innocent persons in commission of crime.

11. Learned counsel for the appellants has vehemently submitted that, looking to the improvements made by P.W. 2, Induben, P.W.7, Jayantilal, P.W.11, Prakash, P.W.13, Jitendra, the prosecution has tried to suppress genesis of occurrence. The true version as to in what manner the incident took place, did not come before the Court. Learned counsel for the appellants submitted that in the complaint Exh.20, P.W.2, Induben, did not state that appellant No.1 had snatched away screw driver from appellant No.2 and it was also not stated in the complaint that appellant No.2 had caught hold of

deceased. Learned counsel also pointed out that in the complaint Induben did not state that appellant No.1 had given blows with screw driver on the back of the deceased. Learned counsel for the appellants also stressed that presence of appellant was also not mentioned in the complaint to the effect that he was standing at a distance with a scooter, engine of which was kept in motion. Relying upon above omission and improvements made in the oral evidence before the Court, learned counsel for the appellants submitted that the prosecution witnesses had tried to suppress real occurrence of the incident and had tried to involve innocent persons with commission of crime. It is true that complainant, Induben, and other eye-witnesses who are interested and related, had made improvements in their oral testimony before the Court as compared to complaint and statements made before the Investigating Agency. The function of the Court is to find out the truth from the evidence led by the prosecution. The witness may exaggerate, because they had lost their near and dear Bharat, who was hardly aged 17 years at the time of the incident. Therefore, we have minutely scrutinized oral testimony of eye-witnesses and have tried to find out the truth with regard to occurrence of the incident. Merely because there are some improvements or contradictions or inconsistency in the oral testimony of eye-witnesses, the whole prosecution story cannot be thrown over-board. Therefore, we do not accept the submission of learned counsel for the appellants that, as the prosecution has suppressed genesis of occurrence of the incident, benefit of doubt should be given to the appellants.

12. Learned counsel for the appellant, next, submitted that all the eye-witnesses examined in this case are related and interested witnesses and, therefore, their evidence should be minutely scrutinized as the witnesses have got the tendency to implicate innocent persons so as to strengthen their case. Learned counsel for the appellants further submitted that the independent witnesses, whose statements were recorded, were not examined before the Sessions Court and, therefore, adverse inference should be drawn against the prosecution. In support of the submission, learned counsel for the appellants placed reliance on the decision of the Division Bench of this Court in the case of State of Gujarat vs. Nanusing and others, reported in 1979 CRI. L.J 627, wherein, the Division Bench of this Court had ruled that, "when the prosecution relies on partisan witnesses while dropping independent witnesses, it will be fatal to the prosecution." It is ruled that,

"where independent witnesses do come forward and make statements to the police with regard to the incident then, non-examination of independent witnesses will be fatal to the prosecution." Learned counsel for the appellants submitted that independent witness, Rasilaben, whose statement was recorded during investigation, and who was mentioned as witness in the chargesheet, was deliberately kept back and was not examined at the trial. Learned counsel further submitted that learned Public Prosecutor in the Sessions Court had filed purshis Exh.60 indicating that the prosecution did not want to examine any witnesses and the prosecution was closing its case. It is submitted that the said purshis was not shown to learned advocate appearing for the appellants in the Sessions Court and, therefore, adverse inference should be raised against the prosecution. In support of the submission, learned counsel for the appellant placed reliance on the decision of the Division Bench of this Court in the case of Meghabhai Motibhai vs. State of Gujarat, reported in 1985 (2) GLR p.793. In the case of Meghabhai Motibhai (supra), the Public Prosecutor, who conducted the case, had, by filing purshis, dropped Ghemra Ramsi stating that he was not an eye-witness and, therefore, the said witness was dropped. The High Court, deprecating the dropping of witness though was an eye-witness, observed that, "it was highly improper and unfair on the part of the learned Public Prosecutor to have dropped Ghemra Ramsi and to have deprived the defence of cross-examining Ghemra Ramsi." It was further observed that, "even the learned Sessions Judge should have asked the learned Public Prosecutor as to why he was dropping this important witness." Purshis Exh.60, which was filed by learned Public Prosecutor, was not shown to learned counsel for the appellants in the Sessions Court. It was the duty of learned Public Prosecutor to show purshis to learned counsel for the appellants in the Sessions Court before closing evidence of prosecution. It is true that when independent witnesses were available with the prosecution, their evidence should be preferred rather than evidence of interested and related witnesses. It requires to be stated that, though the witnesses examined by the prosecution who had witnessed the incident were related, yet their evidence had unfolded prosecution case in its entirety. When learned Public Prosecutor had closed evidence by filing Purshis Exh.60, learned counsel for the appellants in the Sessions Court had not raised any objection or had not requested the Court to examine said Rasilaben as court witness. Therefore, in our view, non-examining of Rasilaben, whose statement was recorded during investigation, will not be fatal to the prosecution case. Therefore, we do not

accept submission of learned counsel for the appellants that adverse inference should be raised against the prosecution for withholding independent witness, Rasilaben, and not offering her for cross examination during trial.

13. All the four eye-witnesses, namely, P.W.2, Induben Jayantilal Soni, P.W.7, Jayantilal Manilal Soni, P.W.11, Prakash Ramanbhai Soni, P.W.13, Jitendra Jayantilal Soni, are close relatives and interested witnesses. Therefore, their evidence requires to be closely scrutinized.

14. It is true that there are improvements in the evidence of complainant, P.W.2, Induben, as compared to her complaint lodged before P.I. Patel, and oral evidence recorded in the Court. In the complaint Exh 21, which is treated as first information report, she had not mentioned name of appellant No.4 as one of the assailants, who had come to her house, as a result of common intention to kill Jitendra or any of his family members. She only mentioned names of appellants Nos. 1 and 2 and appellant no.3 who was described as a fatty boy who was carrying a stick. No identification parade was held of appellant No.4 to identify him as one of the assailants who had come to the house of P.W.2, Induben. In absence of name of appellant No.4 in the first information report, Exh.21, and in absence of any test identification parade to prove identification of appellant No.4 as assailant, we are of the view that appellant no.4 is falsely involved in this case. The complainant, in the first information report at Exh.21, had described appellant no.3 as 'fatty boy' who was carrying a stick, and it was mentioned that he had given stick blow to deceased Bharat on his hand. Even though name of appellant No.3 was not mentioned, no specific description was given by the complainant. Investigating Officer had not held test identification parade. It is settled legal principle that, if assailant was unknown to the complainant, in absence of any test identification parade, if the said assailant is for the first time identified in the Court, then said identification is of no value. (See: AIR 1982 Supreme Court p.39: AIR 2000 (1) Supreme Court Cases (Cri.) 147: in the case of State of H.P. vs. Kekh Raj and another). In absence of any test identification parade with regard to appellant No.3, we hold that identification of appellant No.3 for the first time in the Court by P.W. 2, Induben, is of no consequence.

15. Presence of appellants Nos. 1 and 2, in our

opinion, is established by the prosecution at the place of incident. Appellant No.1 had lurking suspicion that Jitendra was having an affair with his sister, Sapna, which had led him to go to the house of complainant, Induben, prior to two days of the incident, when, he had beaten Jitendra. Though this incident was not reported to the police, we do not find any substance in the submission of learned counsel for the appellants that the said incident was cooked up so as to implicate the appellant No.1 with the second incident which took place on October 3, 1992. Even if evidence of witnesses who are closely related, is minutely examined, the only thing emerges is that appellant No.1 was greatly disturbed because of suspicion in his mind that Jitendra was having affair with his sister, Sapna, to which he had raised serious objection. Learned counsel for the appellant has also submitted that the story that Jayantilal and Ramanbhai had gone to meet the father of appellant No.1 at his office also does not inspire confidence, because there was great variance between evidence of Jayantilal and Induben with regard to visit of two brothers to the office of the father of appellant No.1. The relatives of the complainant did not want to take the issue to the extreme and, therefore, they had not filed any complaint against appellant No.1 when he had assaulted Jitendra on October 1, 1992. The members of the complainant's family wanted an amicable settlement and, therefore, they had visited the father of appellant no.1 and had tried to see that appellant No.1 can be pacified and does not attack Jitendra. We do not find any infirmity in the evidence of Jayantilal or Induben with regard to visit of Jayantilal and Ramanbhai to the office of the father of appellant No.1. Appellant No.1 had serious grievance against the visit of Jayantilal and Ramanbhai to his father's office in the afternoon of October 3, 1992 and, therefore, he had gone in the company of appellant No.2 at 18 hrs on October 3, 1992 to the house of the complainant. When they reached the house of the complainant, he once again raised objection as to why they had made complaint about him before his father. As per the prosecution case, their main target was to teach a lesson to Jitendra, who was having affair with sister of appellant No.1. Not finding Jitendra at the place of incident, verbal exchange took place between P.W.2, Induben, and appellant No.1. In a great heat of moment, appellant No.1 had taken screw driver which he was carrying and had tried to inflict blow on Induben. P.W.2, Induben, in retaliation, had snatched away screw driver from the hand of appellant No.1 and, in that scuffle, appellant No.1 had fallen down. Evidence of the prosecution further reveals that appellant No.2 had in

turn snatched away screw driver from P.W.2 Induben. If the common intention of both the appellants was to launch attack on Jitendra or any of his family members, appellant no.2 would have caused injury with the help of screw driver on Bharat or Induben, but he did not do so. Appellant no.1 had, thereafter, got up and had snatched screw driver from appellant No.2. After snatching away screw driver from appellant No.2, appellant No.1 had uttered words, "if Jitendra is not present, we should finish Bharat". On uttering these words, appellant No.1 had inflicted two blows with screw driver on the back of Bharat which unfortunately pierced through the heart and caused fatal injury, as a result of which, Bharat had succumbed. From the manner in which the incident had taken place and weapon, namely, screw driver, which was used for commission of crime, it cannot be said that appellant No.1 had intention to cause death of Bharat. Even evidence of prosecution witnesses indicates that, before the incident of giving blows of screw driver, there was a scuffle and due to that scuffle, appellant No.1 had got enraged and had inflicted two blows with the help of screw driver on the back portion of Bharat. From the manner in which the incident had taken place, no knowledge can be attributed to appellant No.1 that he had knowledge that blows inflicted by screw driver were likely to cause death. The weapon, which was used by appellant No.1, in ordinary circumstance, would not have caused murder of deceased Bharat. Appellant No.1 had not selected vital part to inflict blows with screw driver. He had given two blows with screw driver at the back, which had, unfortunately, pierced through heart which had caused death of Bharat. From the manner in which the incident had taken place, it cannot be said that appellant No.1 had acted in a cruel manner and had selected a vital part to inflict blows with the help of screw driver. The weapon used and the manner in which the incident had taken place, in our view, make the offence which would fall under Exception IV of Section 300 IPC and would not fall under the definition of 'murder'. The incident had taken place due to fight between the teenagers who were at the relevant time school going children, and, in a heat of moment, appellant no.1 had inflicted blows which had unfortunately caused death of a young boy. Prior to inflicting of blows, there was hot exchange of words between complainant, Induben, and appellant No.1 which had caused provocation to appellant No.1. On the facts, situation and in the circumstances under which blows with screw driver were inflicted at the back of deceased Bharat, we are of the view that offence committed by appellant No.1 would fall under Section 304 Part II and

not under Section 302 of Indian Penal Code, as held by learned Additional Sessions Judge.

16. It may be noted that appellant No.1 was not hardened and habitual offender and he was aged 21 years at the time of incident and was a student. he had no criminal background. Appellant No.1 wanted to teach a lesson to Jitendra and wanted to prevent him from continuing his affair with his sister, Sapna, and, in that attempt, he had launched an assault on Jitendra prior to two days of the incident of October 3, 1992. If appellant No.1 wanted to cause death of Jitendra then he would have carried a lethal weapon which ordinarily would have been carried by an assailant. Carrying of screw driver, that too a small one having length of about 14 cms., itself shows that there was no intention on the part of appellant No.1 to cause death of Jitendra or any of his family members. Therefore, in our opinion, offence in the present case would not fall within the definition of 'murder'.

17. Learned counsel for the appellant No.2, Mr. S.V. Raju, has submitted that, for attracting provisions of Section 34 of the Indian Penal Code, the prosecution must establish that there was prior concert or meeting of minds before commission of crime. Learned counsel further submitted that even if offence was committed on the spur of moment, prior concert must be there. Learned counsel for the appellant No.2 further submitted that the prosecution did not establish that there was meeting of minds with regard to causing murder of Bharat. In our opinion, submission of learned counsel for appellant No.2 deserves acceptance. The prosecution case, as unfolded at the trial, revealed that appellant No.1, in the company of other appellants, had gone to the house of complainant, Induben, to cause murder of Jitendra or any of his family members. The oral evidence of complainant, Induben, shows that appellant No.1 had tried to launch an attack on her with help of screw driver. When screw driver was snatched away by Induben from the hand of appellant No.1, appellant No.2, thereafter, had snatched away screw driver from Induben. The oral evidence of witnesses further reveals that appellant No.1 had snatched away screw driver from hand of appellant No.2 and had uttered words that, "they should finish Bharat if Jitendra is not available". The evidence of prosecution witnesses, as discussed above, is not consistent so as come to the conclusion that there was prior concert to cause death of Bharat. From the conduct of appellants nos. 1 and 2, it cannot be inferred that they had acted in concert to cause death of Bharat. With regard to

catching hold of Bharat by appellant No.2, there is contradictory version in the complaint as well as in the oral testimony of Induben as well as other eye-witnesses. In the oral testimony, it is borne out that appellant No.2 had caught hold of the deceased after blows with screw driver were inflicted by appellant No.1. In the complaint Exh.20, Induben had never stated that appellant No.2 had caught hold of deceased Bharat while appellant No.1 was inflicting blows with screw driver. Therefore, the evidence of the prosecution with regard to appellant No.2 having facilitated appellant No.1 in inflicting blows with screw driver on deceased Bharat, is contradictory and inconsistent. To hold a person guilty under Section 34 of Indian Penal Code, prior concert or meeting of minds is essential. Section 34 lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. Therefore, there must be prior meeting of minds. The evidence, as discussed above, in our view, does not establish that appellants nos. 1 and 2 were acting in concert and there was prior meeting of minds between them and they had formed common intention to cause death of Bharat and in furtherance of that intention they had gone to attack Bharat. In absence of any clinching and consistent evidence with regard to common intention between appellants Nos. 1 and 2 to cause murder of Bharat, appellant No.2 cannot be held guilty for injuries inflicted by appellant No.1 on Bharat. No injury was caused on the vital parts of the body of deceased Bharat. At the best, motive of crime was to wreck vengeance on Jitendra as appellant No.1 suspected that he was having affair with his sister, Sapna. Circumstances emerging from the evidence of prosecution witnesses showed that intention of appellant No.1 and appellant No.2 was not to cause murder of Bharat. Appellants Nos. 1 and 2 had only gone to the house of the complainant just to give them a thrashing or teach them a lesson and to stop Jitendra from continuing his affair with the sister of appellant No.1. Weapons, which were carried by appellants Nos. 1 and 2, cannot be called as deadly weapons so as to cause death of any person. Appellant No.1 was carrying a small screw driver and it is alleged that the appellant No.2 was carrying a stone. By no stretch of imagination, it can be said that carrying of screw driver and stone was sufficient to come to the conclusion that appellants Nos. 1 and 2 had

common intention to cause death of Jitendra or any of his family members. Learned counsel for appellant No.2 has invited our attention to the decision of the Supreme Court in the case of Ramashish Yadav and others vs. State of Bihar, reported in 2000 Supreme Court Cases (Cri) 9. In the above case before the Supreme Court, two persons had held the deceased while other two had given gandasa blows to the deceased, and, on the above facts, the Supreme Court held that, 'merely because two persons held the deceased, it cannot be held that they had common intention with other two persons to cause murder of the deceased. In the facts of the present case, though appellant No.2 had accompanied appellant No.1 and was carrying a stone, there is no evidence that he had intention or there was prior meeting of minds between the appellants Nos. 1 and 2 to cause any injury, which was likely to cause death. Only evidence against appellant No.2 is that he had given blow with stone on back of deceased Bharat which had not caused any serious injury. With regard to allegation of catching hold of deceased Bharat by appellant No.2, the evidence is very shaky. There are many contradictions and omissions in the evidence of prosecution witness whether appellant No.2 caught hold of deceased Bharat before appellant no.1 gave blow with his screw driver or appellant No.2 caught hold of deceased Bharat while he was falling down after infliction of blows by screw driver. In view of this contradictory evidence, appellant No.2 can only be convicted for offence under Section 325 of Indian Penal Code and not under Section 302 read with Section 34 of Indian Penal Code.

18. For the reasons stated in the foregoing paragraphs, the appeal is partly allowed. Conviction and sentence of appellant No. 1 under Section 302 of the Indian Penal Code are quashed and set aside and, instead, appellant No.1 is convicted for offence punishable under Section 304, Part II, of Indian Penal Code and sentenced to undergo imprisonment for seven years and fine of Rs.5000/- in default R.I. for six months. We are informed that appellant No.1 is in custody since October 4, 1992 and, therefore, we order that appellant No.1 shall be set at liberty forthwith if his presence is not required in any other case. Conviction and sentence of appellant No. 2 under Section 302 read with Section 34 of the Indian Penal Code are quashed and set aside and, instead, appellant No.2 is convicted for offence punishable under Section 325 of Indian Penal Code and sentenced to undergo imprisonment for four years and fine of Rs.5000/- in default R.I. for six months. We are informed that appellant No.2 has already remained in

custody for 4 years and 8.1/2 months and, therefore, the period during which he remained in custody be treated as sentence already undergone. Conviction and sentence of appellants Nos. 3 and 4 under Section 302 read with Section 34 of the Indian Penal Code are quashed and set aside. Appellant Nos. 3 and 4 are acquitted from the offences for which they were charged. Appellant No.3 is in custody and he shall be set at liberty forthwith if his presence is not required in any other case. Bail bonds of appellants Nos. 2 and 4 shall stand cancelled. Muddamal be disposed of in terms of direction given in the impugned judgment and order dated September 16,1993, by the learned Additional Sessions Judge, Ahmedabad (Rural), in Sessions Case No.16 of 1993.

Direct service is permitted.

September 20, 2000 (M.H. Kadri, J.)

(A.L. Dave, J.)

(swamy)